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The New Architecture of EU Equality Law after CHEZ: Did the Court of Justice reconceptualise direct and indirect discrimination?

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Introduction

The Court of Justice's decision of the 16 July 2015, in Case C-83/14 *CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia*, is a critically important case for two main reasons. First, it represents a further step along the path of addressing ethnic discrimination against Roma communities in Europe, particularly in Bulgaria, where the case arises. Second, it provides interpretations (sometimes *controversial* interpretations) of core concepts in the EU anti-discrimination Directives that will be drawn on in the application of equality law well beyond Bulgaria, and well beyond the pressing problem of ethnic discrimination against Roma.

This article will focus particularly on the second issue, the potentially broader implications of the case. In particular, it will ask whether the Court of Justice's approach in *CHEZ* is subtly redrawing the boundaries of EU equality law in general, in particular by expanding the concept of direct discrimination, or whether the result and the approach adopted is *sui generis*, one depending on the particular context of the case and the fact that it involves allegations of discrimination against Roma, and therefore of limited general application.

CHEZ *in the Bulgarian context*

Before turning to these broader issues, however, the importance of the case in the Bulgarian context deserves attention. For many years, a practice has been operated by CHEZ, one of the major Bulgarian suppliers of domestic electricity, of distinguishing between urban districts in the way in which electricity meters were provided to consumers of its electricity.[1] In urban areas which were inhabited mainly by persons of Roma origin, the meters were placed on pylons forming part

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[1] The facts stated here are abstracted from the more detailed finding of the CJEU, at paragraphs [21] to [23].

of the overhead electricity supply network at a height of between six and seven meters; by contrast, in other areas, they were placed at a height of 1.70 meters, usually on the consumer's own property. The reason that CHEZ gave for the difference was that it was necessary to place the meters higher in certain areas in order to prevent fraud, in particular by making unlawful connections to the electricity supply by people in these areas more difficult. The areas chosen were those in which the problem of illegal connections and tampering with the meters was particularly prevalent.

The national equality body in Bulgaria, *Komisia za zashtita ot diskriminatsia (KZD)*, has for many years been concerned with what they consider the unlawful discrimination against Roma that this practice involved, and it has issued several findings of unlawful discrimination against CHEZ in this regard, which are routinely appealed to the Bulgarian courts. Issues of both Bulgarian and EU equality law arise in these cases. In a previous case, KZD itself referred questions regarding the interpretation of EU equality law to the CJEU on a preliminary reference, but the CJEU held that it had no jurisdiction to consider the matter because KZD was not a court and therefore could not refer questions to the CJEU.[2] In that case, Advocate General Kokott provided an extensive Opinion on the merits of the discrimination issue.[3]

And there matters stood until the latest case, which is the subject of this article, in which the Bulgarian administrative court, hearing an appeal by CHEZ against a finding of KZD, referred an elaborate set of questions to the CJEU, which accepted jurisdiction because in this case the referring body was a court, and replied with a reasoned judgment addressing the substantive issues raised by the questions put. Again, Advocate General Kokott provided a detailed opinion.[4] Judge Prechal was the Judge-Rapporteur. Both, of course, have extensive experience in dealing with discrimination issues.

The decision of the CJEU in *CHEZ* is unlikely to be the end of the Bulgarian litigation, since the responses by the CJEU to the questions put will require the referring Bulgarian court to engage in further extensive fact-finding and application of EU law to those facts, as well as considering whether Bulgarian anti-discrimination law adequately implements EU law in several respects. It will be of

[2] *Belov (C-394/11, EU:C:2013:48).*
[3] Opinion in *Belov (C-394/11, EU:C:2012:585).*
[4] Opinion of Advocate General Kokott delivered on 12 March 2015.

considerable interest in the context of Roma rights to see how the Bulgarian court deals with the answers provided by the Court of Justice. The *CHEZ* case looks set to make the CJEU a key element in future Roma rights litigation strategy, as the European Court of Human Rights has been in the past.

Broader issues considered

Turning to the broader questions to which the case potentially gives rise, these can usefully be divided into four areas of EU equality law interpretation, and the remainder of the article will address each of these in turn: (i) the implications of the case for the use of the EU equality directives prohibiting ethnic discrimination in non-Roma contexts; (ii) the meaning of "direct" discrimination; (iii) the scope of "indirect" discrimination; and (iv) the appropriate way in courts applying EU ant-discrimination law should address the "justification" issue in indirect discrimination.

All, except the first of these, have potentially considerable importance for each of the equality directives, whether concerned with ethnic discrimination or not, because the Court's reasoning engages both with the *meaning of concepts* that are common to all the directives ("direct discrimination", "indirect discrimination", and "justification") and with the implications these have for *litigation practice* across all of these directives in so far as they address "indirect discrimination" (who can take cases of indirect discrimination?). This article will first suggest what these broader implications may be, before turning finally to the question of whether, despite these potentially broader implications, the case should be seen as driven by the context of the particular facts of the case, and in particular whether it should be seen as primarily driven by the type and degree of discrimination against Roma prevalent in central and eastern Europe in particular.

Implications for "ethnic" discrimination litigation

One of the recurring issues that arises in the context of "ethnic" discrimination is what is meant by the term "ethnic", and in which contexts the term applies. This issue is particularly acute where, as in several European states, there is considerable unease regarding "racial" categories, which are seen as dangerously close to accepting the long-discredited myth that there is a scientific basis for racial differences. In such contexts, the use of the "ethnic" criterion seems less controversial because it does not have the tainted associations of "racial"

categories. But what is "ethnicity" for the purposes of Council Directive 2000/43/EC?[5]

The *CHEZ* case provides intriguing answers to this question. To understand why, we need to understand several aspects of the way in which the case was presented. The case involves an allegation of direct and indirect discrimination against CHEZ by Anelia Nikolova, who runs a grocer's shop in the district of a town which is inhabited mainly by persons of Roma origin. There were several complications in her case. The first complication was that Ms Nikolova originally presented the case in the Bulgarian legal proceedings as a case of discrimination on grounds of "nationality", but the Bulgarian proceedings were conducted on the basis that the case concerned an allegation of ethnic discrimination under the Directive (discrimination on the basis of nationality is expressly excluded from the coverage of the Directive).[6] The second complicating factor was that the Bulgarian court regarded Ms Nikolova's allegation of ethnic discrimination against her as based on her identifying with the Roma community in the district in which she traded,[7] and therefore as of Roma ethnicity, but she stated before the CJEU that she was not herself Roma, and the CJEU did not base their finding on any "identification" theory.[8]

We shall see the implications of these issues for the interpretation of direct and indirect discrimination generally in a moment, but the issue on which the article will focus first, is how the Court approached the meaning of "ethnicity" in general, and Ms Nikolova's ethnicity in particular.

Advocate General Kokott first noted that, from a "European perspective," "the Roma are to be regarded as a separate ethnic group who also require special protection,"[9] simply citing the European Court of Human Rights decision in *DH v Czech Republic,*[10] but giving no further explanation. The Grand Chamber went somewhat further, however. In a brief, but significant, holding, the Court considered that "the concept of ethnicity … has its origin in the idea of societal groups marked in particular by common nationality, religious faith, language,

[5] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ 2000 L 180, p. 22).
[6] CJEU, at paragraph [26]; AG, at paragraph [29].
[7] CJEU, at paragraph [26]; AG, at paragraph [29].
[8] CJEU, at paragraph [49].
[9] AG, at paragraph [43].
[10] *D.H. and Others v. the Czech Republic, no. 57325/00.*

cultural and traditional origins and backgrounds."[11] Applying this "objective" understanding, Roma constituted an ethnic group, with the Court not only citing with apparent approval the ECtHR's decision in *DH*, but also those in *Nachova v Bulgaria*,[12] and *Sejdić and Finci v Bosnia*.[13] The implications of this approach in the EU context in cases where groups other than Roma are involved remains to be seen, and we can expect references to the Court seeking further explanations, for example concerning whether all the criteria in the list need to be satisfied before a group can be considered as constituting an "ethnic" group, or merely some, and if so which, and what the differences are between "ethnicity" and "nationality", and between "ethnicity" and "religion".[14]

And what of Ms Nikolova's ethnicity? In contrast to the "objective" standard adopted regarding what an ethnic group is, a much more "subjective" approach is adopted, by Advocate General Kokott at least, as regards whether a particular person is to be regarded as a member of the ethnic group in question. The "mere finding that the Roma are a separate group," she observed, was "not sufficient in itself to provide a satisfactory answer" to the question of whether, under the Directive, Ms Nikolova "may rely on the prohibition of discrimination based on ethnic origin".[15] One way in which plaintiffs might be able to do so would be if the plaintiff herself belonged to the Roma ethnic group, and Advocate General Kokott makes clear that "[i]n case of doubt, self-identification by the individual concerned continues to be the determining factor in assessing whether or not he or she is to be regarded as a member of the ethnic group in question."[16] The Grand Chamber did not address the issue directly. If Advocate General Kokott's approach stands, then problematic issues may arise, such as whether, in a case of alleged indirect discrimination, an individual may simply opt-in to an ethnic group that would itself deny membership to that individual?[17] For reasons that we will consider in a moment, that problem may be reduced in significance because of another aspect of the Court's judgment, concerning "discrimination by association".

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[11] Appearing to apply the approach to ethnicity articulated by the United Kingdom final court, the House of Lords (before it became the Supreme Court), in *Mandla v Lee*, although that case is not cited by the CJEU.
[12] *Nachova v Bulgaria*, no. 43577/98.
[13] *Sejdić and Finci v Bosnia Herzogovina*, nos. 27996/06 and 34836/06.
[14] For further discussion, see Christopher McCrudden and Brendan O'Leary, *Courts and Consociations: Human Rights versus Power-sharing* (OUP, 2013), 121ff.
[15] AG, at paragraph [44].
[16] AG, at paragraph [50].
[17] See, for example, the decision of the UK Supreme Court in *E v Governing Body of JFS* [2009] UKSC 15. A boy claimed admission to a Jewish school on the basis that he was Jewish, arising from his self-identification with Judaism. He was refused admission on the basis that his mother was not Jewish, either by birth or conversion, and he had not himself converted to Judaism, and that according to Jewish law (*Halacha*), he was not considered to be Jewish even though he self-identified as a Jew. The author was Junior Counsel representing JFS in this case.

The meaning of "direct" discrimination

The concept of "direct" discrimination is at one and the same time both central to the architecture of the EU equality directives, and highly problematic in its meaning. This centrality, combined with its uncertain meaning, is a recipe for litigation, and this issue has dominated much anti-discrimination litigation in the domestic courts of several Member States, particularly as equality law has expanded exponentially over the last ten years. It is not surprising, therefore, that it should also be a central issue in the context of path breaking cases such as *CHEZ*.

There are several linked issues that complicate a legal understanding of direct discrimination. One issue is whether the concept should be seen as primarily addressing discrimination against individuals or groups. A second critical issue is whether it should be seen from the perspective of the alleged perpetrator or from the perspective of the alleged victim, and this question is often linked to the issue of whether, and if so how far, the discriminatory intention of the perpetrator is relevant. A third complicating factor is what precisely the relationship is, legally, between direct and indirect discrimination. We know, of course, that in most circumstances direct discrimination cannot be "justified", whereas indirect discrimination incorporates an idea of justification into the concept itself, but what, in particular, is the added value of the concept of indirect discrimination, and what effect should this have on the scope of direct discrimination?

As in the domestic context, a critical question in the interpretation of direct discrimination is what discrimination "*on the grounds of*" a particular protected characteristic (such as ethnicity) involves. In the *CHEZ* case, the issue was further complicated by one of the features of the case mentioned above: viz. that Ms Nikolova complained of direct ethnic discrimination against her, even though she was not herself a member of the ethnic group that she said was the target of the less favourable treatment.

The approach that Advocate General Kokott adopted was to interpret the concept of direct discrimination as applying not only to persons who were members of the targeted group but also to those "associated" with that group, developing further the concept of "discrimination by association," as she termed it, which the

CJEU first adopted in the *Coleman* case.[18] In *Coleman*, the Court held, for example, that discrimination against person A because of their association with person B who is disabled, on the ground of the disability of person B, constituted discrimination against A on the grounds of disability. In other words, discrimination "on the grounds of" a protected characteristic did not depend on the person discriminated against having, or being perceived to have, these characteristics; Council Directive 2000/78/EC[19] did not prohibit discrimination only "on the grounds of [*the victim's*]" protected characteristics, but other's as well.

As applied to the facts of the *CHEZ* case itself, Ms Nikolova was permitted to allege that she had been directly discriminated against on grounds of ethnicity; she was treated less favourably because she lived in a Roma-dominated district. As Advocate General Kokott says: "The contested practice by CHEZ is directed in a wholesale and collective manner at all persons who are supplied with electricity by that undertaking" in that district.[20] She continues: "Should it transpire hereinafter that this practice entails discrimination against the Roma living in that district, the wholesale and collective character of the practice means that inevitably 'discrimination by association' is also suffered by those who are not themselves Roma," including Ms Nikolova.[21]

There are several important issues arising from different elements in the approaches taken to the meaning of direct discrimination as set out above. The first involves the concept of "discrimination by association". Apart from the fact that the CJEU is careful to avoid using this term, the Advocate General and the Court subtlety differ on when it arises. The broadest approach is that set out by the Advocate General. She finds that it arises "first and foremost, by those who are in a close personal relationship with a person possessing one of the [protected] characteristics",[22] such as was the case in *Coleman* itself. She goes on, however, to make clear that "the existence of such a personal link is certainly not the only conceivable criterion for regarding a person as suffering 'discrimination by association'."[23] In an important, if controversial, sentence she continues: "The fact that the measure at issue is discriminatory by association may be inherent in the measure itself, in particular where that measure is liable, because of its wholesale

[18] *Coleman v Attridge Law*, C-303/06, European Court of Justice (Grand Chamber), 17 July 2008.
[19] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation (OJ 2000 L 303, p. 16).
[20] AG, at paragraph [60].
[21] AG, at paragraph [60].
[22] AG, at paragraph [57].
[23] AG, at paragraph [58].

and collective character, to affect not only the person possessing one of the [protected] characteristics … but also – as a kind of 'collateral damage' – includes other persons."[24]

The CJEU itself addresses this issue in language that is potentially equally broad, if in a different way. The requirement of equal treatment, the Court says, "applies not to a particular category of person but by reference to the grounds mentioned … so that principle is intended to benefit also persons who, although not themselves a member of the [protected] group concerned, nevertheless suffer less favourable treatment or a particular disadvantage on one of those grounds."[25] The Court's approach is relatively uncontroversial in so far as it regards as direct discrimination a situation where person A treats person B less favourably because of person C's protected characteristics – that is *Coleman*, and now *CHEZ*. But the question that the Advocate General's and the Court's language gives rise to, and which may generate further references to the CJEU, is how far beyond the *Coleman*- and *CHEZ*-type situations, "discrimination by association" goes.

To take one topical example that is currently the subject of litigation in the United Kingdom under domestic anti-discrimination law,[26] would it amount to direct discrimination for person A to treat person B less favourably on the grounds of A's protected characteristics, completely ignoring B's and C's characteristics? The issue arose in the following way: the applicant (B), who was gay, requested that a cake be made for him by a bakery (A), the directors of which were Christian, and whose religious and political beliefs were opposed to same sex marriage. Same sex marriage is not permitted in Northern Ireland, unlike the rest of the United Kingdom. The cake requested was to be iced with the message "support gay marriage". The bakery refused because the directors objected to the message, but were otherwise quite prepared to serve the customer, and had done so in the past. The customer wanted to bring the cake with the message to a party which was to celebrate the end of "anti-homophobia week, which would be attended by several people who were gay (C). A cake, with the requested message, was subsequently prepared by another bakery and was brought to the party by B. The directors of the bakery argued that they neither knew nor cared whether B or C were gay; they objected to the message on the cake, not the characteristics of B or C. The court

[24] AG, at paragraph [58].
[25] CJEU, at paragraph [56].
[26] *Lee v Ashers*, Northern Ireland County Court, 19 May 2015, available at: < http://www.equalityni.org/ECNI/media/ECNI/Cases%20and%20Settlements/2015/Lee-v-Ashers_Judgement.pdf> currently on appeal to the Northern Ireland Court of Appeal. The author is Junior Counsel representing *Ashers* in this case.

held, however, that the actions of A amounted to unlawful discrimination "on the grounds of" sexual orientation and political belief; in this case, it was the beliefs and sexual orientation of A, rather than B or C that was relevant. The case is currently under appeal. The issues arise under domestic law, rather than EU law, but they neatly illustrate the type of situation that can arise for decision under the expanded approach to the phrase "on the ground of" that the Advocate General and the Court of Justice have now adopted.

Leaving these questions aside, the *CHEZ* judgment is also important for what it says about the meaning of direct discrimination more generally. The interest arises because of the Advocate General's and the Court's approach to whether CHEZ's practice entailed direct discrimination against Roma living in that district. The answer from the Advocate General was 'no',[27] whereas the CJEU suggests that it may be, and sets out the type of issues the referring court needs to consider further.[28] On this critical issue, then, there is some apparent difference between the CJEU and Advocate General Kokott.

The Advocate General sets out two different ways in which it *might* be argued that direct discrimination arises. First, the contested practice might have been chosen by the company "*on the basis of* the ethnic origin of the inhabitants" of the district.[29] On this issue, she holds that there are "no specific indications either in the order for reference or in the observations submitted by the parties to the proceedings to suggest that the contested practice was chosen specifically" on that basis.[30] Alternatively, the contested practice might be considered directly discriminatory "where a measure is apparently neutral, but actually affects or is capable of affecting only persons possessing" the protected characteristic.[31] On this issue, she also held that these circumstances did not exist in this case.

The CJEU did not address the Advocate General's second approach, but in the case of the first, the Court was unwilling to follow the Advocate General's conclusion. Instead, the Court identified what would be needed for a finding of direct discrimination of that type to be found, and urged the referring court to engage in thorough fact-finding in order to determine whether the districts had been targeted specifically because they were Roma-dominated.

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[27] AG, at paragraph [87].
[28] CJEU, at paragraph [80].
[29] AG, at paragraph [81].
[30] AG, at paragraph [81].
[31] AG, at paragraph [82].

The potential importance of the case lies more in the second approach taken by the Advocate General than that of the CJEU. If this second approach reflects the position under EU equality law, what type of measure is "apparently neutral, but actually affects or is capable of affecting only persons possessing a certain [protected] characteristic"? The term used subsequently by the Advocate General is that the measure must be "inextricably linked" to the protected characteristic.[32] She provides three examples where this arises. Discrimination on grounds of a person's pregnancy, she says, is direct discrimination against the pregnant woman on grounds of sex "because it is capable of affecting women *only*."[33] Discrimination against a person on the basis of whether the person is entitled to an old-age pension is direct age discrimination because such a rule is "capable of having an effect *only* for the benefit or to the detriment of persons of a certain age."[34] Direct discrimination on grounds of sexual orientation against a couple arises "where a benefit provided for [married] couples is withheld from same-sex couples who … do not themselves have access to the institution of marriage."[35] The Advocate General held that, on the facts of the *CHEZ* case, the contested practice "is not as inextricably linked to their ethnic origin as pregnancy is to a person's sex, as entitlement to an old-age pension is to a person's age …".[36] Living in the targeted district was not "inextricably" linked to Roma ethnicity because there were many in the district who were not Roma.

But how far might the AG's second approach go? There is a lengthy jurisprudence in the United Kingdom on these questions, and if the practice there is anything to go on, this is likely to be a source of further tricky references to the CJEU. To give just one example: is it direct *ethnic* discrimination if less favourable treatment is accorded someone on the basis of whether a person is Jewish according to Jewish *religious* law ("*Halacha*")?[37] In particular, where, exactly, is the dividing line between this second approach to direct discrimination and the concept of indirect discrimination?

[32] AG, at paragraph [86].
[33] AG, at paragraph [83].
[34] AG, at paragraph [83].
[35] AG, at paragraph [83].
[36] AG, at paragraph [86].
[37] *E v Governing Body of JFS*, see above, at footnote 16.

The meaning and practice of "indirect" discrimination

If the *CHEZ* case, in retrospect, may be seen as significantly blurring the boundaries between direct and indirect discrimination, it may also be seen as expanding the potential of indirect discrimination itself, at least in so far as domestic jurisprudence and domestic legislation in some Member States understands the concept. In this expansion, the Advocate General and the Grand Chamber appear to stand shoulder to shoulder.

There are two main aspects of the approach to indirect discrimination in the Advocate General's Opinion and the Judgment of the Court to which attention should be drawn. The first concerns the conceptual meaning of indirect discrimination. In quick succession, the Advocate General and the Court make three important conceptual points: (i) the term "apparently" in the definition of direct discrimination (as in, "where an *apparently* neutral provision …") does not refer to a practice that is "manifestly" neutral, but one that is "ostensibly" neutral;[38] (ii) if the contested measure was introduced because those affected were targeted on the basis of their protected characteristic, then that amounts to direct rather than indirect discrimination;[39] (iii) the term "put … at a particular disadvantage" does not mean that a particularly serious disadvantage must be identified, but rather that there is indirect discrimination wherever the contested practice affects members of a protected group, in the words of the Advocate General, "more adversely" than others.[40]

Whilst important in clarifying the concept of indirect discrimination in these fundamental respects, none of these points should come as any real surprise to practitioners. More surprising, and potentially more significant in terms of changing litigation practice in some Member States, is the second main aspect of the Advocate General's and the Court's approach to indirect discrimination. This involves expanding the range of those who are able to mount an indirect discrimination complaint, an expansion due to the application of the concept of "discrimination by association" to indirect discrimination.

The issue arose because Ms Nikolova's claim of indirect discrimination, like her claim of direct discrimination, was not based on she herself being Roma but

[38] AG, at paragraph [92]; CJEU, at paragraph [93].
[39] CJEU, at paragraph [95].
[40] AG, at paragraph [93].

was rather based on her being, in the words of the Advocate General quoted above, "collaterally damaged"[41] by the indirect discrimination that primarily affected the Roma group, because it was they who predominated in the district targeted for the special measures taken by the company. Although not put in these terms, she suffers what might be called "*indirect* indirect discrimination", and both the Advocate General and the Court accepted that such a claim should be allowed under the Directive.[42] The important point here is not just that such a claim is permitted under the EU equality directives, but that (following *CHEZ*) such a claim *is required* under national law for national law to be regarded as properly implementing these directives.

This means in practice that those Member States that only permit allegations of indirect discrimination to be made by members of the group adversely affected, or by a body specially designated to take such cases in the public interest, and not by others (such as Ms Nikolova), are now in violation of EU equality law. This is a significant expansion, in at least some Member States, in the range of those who must now be permitted under national laws to be able to litigate indirect discrimination claims.

The approach adopted in the United Kingdom, for example, would appear now not to comply with the equality directives, as interpreted by the CJEU in *CHEZ*. In the Equality Act 2010, the definition of indirect discrimination is as follows:[43] a person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's. A provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if each of four conditions is satisfied: if A applies, or would apply, it to persons with whom B does not share the characteristic; *and* if it puts, or would put*, persons with whom B shares the characteristic* at a particular disadvantage when compared with persons with whom B does not share it; *and* if it puts, or would put, B at that disadvantage; *and* if A cannot show it to be a proportionate means of achieving a legitimate aim. All four of these criteria must be satisfied for it to amount to indirect discrimination.

As can be seen, the highlighted provision in the approach taken in the UK would clearly exclude someone in the position of Ms Nikolova, and it would appear

[41] AG, at paragraph [58].
[42] AG, at paragraph [61]; CJEU, at paragraph [60].
[43] Equality Act 2010, section 19.

that, as a result of the *CHEZ* case, the UK is in violation of EU law. The implications of this broadening in the practice of indirect discrimination are of some importance.

If this broader approach is applied in the sex discrimination context, for example, it would appear to require national law to permit a man working in the same pay grade as a group of women to take an equal value pay claim against his employer, based on the discrimination against the women compared, provided he could show that his wages were adversely affected because he worked in a pay grade dominated by women. Whether this is a progressive development is, perhaps, open to debate.

On the one hand, it may lead to indirect discrimination being more widely used than it appears to be at the moment. It is notoriously the case that indirect discrimination has been underutilised in comparison with direct discrimination and that the effect of this underuse has been to leave considerable areas of institutional or structural discrimination unchallenged. On the other hand, it could lead to the major method by which such structural discrimination can be challenged being increasingly occupied and moulded by litigation brought by members of groups which are only tangentially affected ("collaterally damaged") by the structural discrimination, with the potential that the voices of the groups primarily affected will be more marginalised than if they had been the primary litigants. It has long been a source of complaint that the major beneficiaries of some types of sex discrimination claims have been men; the application of "discrimination by association" to indirect discrimination could become another example of the same phenomenon.

"Objective justification" in indirect discrimination

The third significant issue that the CJEU addresses concerns the scope of the "objective justification" that applies in the indirect discrimination context. Both the Advocate General and the Court carefully set out the approach that the referring court must adopt when it is assessing the claims of "objective justification" advanced by the company for the contested practice.[44] There are two main requirements which the domestic court must find to be satisfied before it can uphold a claim of objective justification: the action must be in pursuit of a

[44] AG, at paragraph [111]; CJEU, at paragraph [113].

"legitimate aim"; and the means of achieving that aim must be appropriate and necessary (the requirement of "proportionality").

The Court accepts that, in the context of the *CHEZ* case itself, the prevention of fraud and other unlawful conduct could, in theory, constitute a legitimate aim, but stresses the need for the court to go beyond simply identifying the theoretical legitimacy of the aim. The domestic court must assess whether a legitimate aim is *actually* being pursued. As the Court says, the "company has the task at the very least of establishing objectively, first, the actual existence and extent of that unlawful conduct and, second, … the precise reasons for which there is, as matters currently stand, a major risk in the district concerned that such damage and unlawful connections to meters will continue."[45] As regards the means adopted, the court must "determine whether other appropriate and less restrictive measures … exist for the purpose of achieving the aims invoked by CHEZ."[46] And, like the Advocate General, the Court also points to the need to take into account the legitimate interest of the consumers of electricity "in having access to the supply of electricity in conditions which do not have an offensive or stigmatising effect."[47]

The Court goes further, however, than merely leading the referring court through the issues that it must address. It concludes the section of its judgment in which it addresses "objective justification" with a none-too-subtle steer, in case the referring court had not picked up the signals that the Court was sending. Although the Court recognises that it is "for the referring court to carry out the final assessments which are necessary" in deciding whether the company has established an "objective justification",[48] the Court states clearly: "it seems that it necessarily follows from the taking into account of all the foregoing criteria that the practice at issue cannot be justified … since the disadvantages caused by the practice appear disproportionate to the objectives pursued."[49]

What is driving the Court's anti-discrimination jurisprudence?

It is likely to become a topic of considerable scholarly debate, as well as practical importance, as to why the Court adopts the positions it does in *CHEZ*. There are several difficulties in divining the Court's motivation. There is, first, the fact that

[45] CJEU, at paragraph [116].
[46] CJEU, at paragraph [122].
[47] AG, at paragraph [132]; CJEU, at paragraph [124].
[48] CJEU, at paragraph [127].
[49] CJEU, at paragraph [127].

CHEZ cannot be taken as an isolated case and it must be set in the wider context of the Court's recent jurisprudence as a whole – a task that is well beyond the scope of this brief article. There is, second, the fact that the Court itself is generally notoriously unforthcoming in articulating the deeper principles that may be driving its approach to anti-discrimination law, and this lack of transparency is noticeable in *CHEZ* too.

These caveats aside, however, there are hints in the Court's judgment and clearer (if still cursory) statements in Advocate General Kokott's opinion that several values animate the approach they take in the case. There are three ideas in particular that recur in the opinion and/or the judgment: stigma, offence and humiliation.[50] As perceived by the Advocate General and the Court, particularly the former, the practice of the company is imbued with an approach to the Roma residents of the districts targeted that seems, at best, careless of the humiliating effect of the special measures adopted and unconcerned if all in the district are stigmatized by the company's practice, and at worst, calculated to produce just such humiliation and stigma. If the analysis suggested in this article of the Court's understanding of the context of the case is correct, then it is uncertain how far the Court in *CHEZ* can really be seen as adopting general principles of European anti-discrimination law in areas in which such a degree of stigma and humiliation are less apparent in practice. Although expressed as interpretations of equality law of general application, ultimately what we see in *CHEZ,* perhaps, is an example of the fracturing of EU equality law, with the *particular* protected ground in question and even the *particular* protected group involved, being the real determinants of the approach adopted.[51]

And perhaps that is preferable to the adoption of a general theory of EU equality law *tout court* that sees the avoidance of humiliation and stigma as the overall purpose of equality law across all grounds, and across all protected groups. There is a telling moment in the Advocate General's opinion where she appears to see the whole of EU anti-discrimination law through the lens of harassment (from which she appears to derive ideas of offensiveness, humiliation, and stigma), which seems too much like the proverbial tale wagging the proverbial dog.[52] Whilst adopting a highly expressive analysis of the function of EU equality law may be

[50] "Humiliation": AG, at paragraphs [60] and [133]; "stigma": AG, at paragraphs [4], 49, [60], [66], [95], [101], [129], [131], [132], [135], [139], [147]; CJEU, at paragraphs [87], [108], [124], [128]; "offence": CJEU, at paragraphs [87], {108], [124], [128], [129].
[51] See the earlier discussion in Christopher McCrudden, "Thinking About the Discrimination Directives", 1(1) *European Anti-Discrimination Law Review* 17 (2005).
[52] AG, at paragraph [133].

progressive in the context of dealing with discrimination against the Roma people as in the *CHEZ* case, it may be much less progressive if it means that *only* practices that are demeaning, humiliating, and stigmatizing are addressed aggressively, or if they are regarded as being at the core of anti-discrimination law. If that were to become the new norm, it would be far from progressive. However important it is to address discriminatory practices of that type, anti-discrimination law is more, much more, than that, although what exactly remains stubbornly problematic.